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No. 07-1310

In the Supreme Court of the United States

JULIO CESAR VALENZUELA GRULLON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an alien who has been ordered removed by an immigration judge must exhaust administrative remedies, as required by 8 U.S.C. 1252(d)(1), by appealing to the Board of Immigration Appeals before petitioning for judicial review of the removal order in the federal courts of appeals, when the alien's legal argument is foreclosed by a prior decision of the Board sitting en banc.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 509 F.3d 107.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2008. On February 13, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 26, 2008. On March 18, 2008, Justice Ginsburg further extended that time to April 15, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 237 of the Immigration and Nationality Act (INA), 8 U.S.C. 1227, provides that several classes of aliens are subject to removal, including those who "ha[ve] been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance * * *, other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i). The Department of Homeland Security (DHS)—or, before March 1, 2003, the former Immigration and Naturalization Service (INS)[1]—may formally charge an alien with removability under Section 237(a) by issuing a notice to appear. 8 U.S.C. 1229a(a)(1); 8 C.F.R. 239.1(a). Removal proceedings commence when DHS files the notice with the immigration court. 8 C.F.R. 1003.14(a), 1239.1(a).

In a removal proceeding conducted by an immigration judge, an alien may apply for any relief from removal for which he considers himself eligible. 8 C.F.R. 1240.1, 1240.11. Section 240A(a) of the INA provides the Attorney General with discretion to cancel the removal of an alien who:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and

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[1] On March 1, 2003, INS was abolished and many of its functions were transferred to the newly created DHS. See 6 U.S.C. 251, 271(b), 291.

(3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a). Section 240A(d) sets forth rules for computing the time of continuous residence, including the so-called "stop-time rule":

> **(1) Termination of continuous period**
>
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) * * * when the alien is served a notice to appear under section 1229(a) of this title, or (B) *when the alien has committed an offense* referred to in section 1182(a)(2) of this title that renders the alien * * * removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1) (emphasis added). An application for cancellation of removal may be "filed only with the Immigration Court after jurisdiction has vested pursuant to [8 C.F.R.] 1003.14." 8 C.F.R. 1103.7, 1240.20(b).

After a merits hearing, the immigration judge issues either an oral or written decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the immigration judge enters an order of removal, the statute requires the immigration judge to "inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties." 8 U.S.C. 1229a(c)(5).

b. The Board of Immigration Appeals (Board) hears appeals from decisions of immigration judges. 8 C.F.R. 1003.1, 1240.15. Regulations direct that, with exceptions not pertinent here, a decision appealed to the Board

"shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending." 8 C.F.R. 1003.6(a). Under the statute, a removal order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. 1101(a)(47)(B); see also 8 C.F.R. 1003.39.

c. The INA also includes a detailed scheme for judicial review of final orders of removal. Under Section 242(d), a court "may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d). As originally enacted in 1996, Section 242 barred court of appeals jurisdiction to review removal orders entered against certain classes of criminal aliens, including those convicted of controlled-substance-related offenses. 8 U.S.C. 1252(a)(2)(C) (2000). As a result, many criminal aliens filed petitions for habeas corpus in federal district courts. Congress, however, eliminated habeas corpus review of final orders of removal in Section 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310. Now, the sole means of obtaining judicial review of a final order of removal is through a petition for review in a court of appeals. 8 U.S.C. 1252(a)(5). That section further provides that an alien whose criminal conviction previously operated to preclude judicial review of an order of removal by way of a petition for review may now obtain "review of constitutional claims or questions of law" by means of such a petition. 8 U.S.C. 1252(a)(2)(D).

Section 106(c) of the REAL ID Act specifically addressed habeas petitions that challenge "a final administrative order of removal, deportation, or exclusion" and were "pending in a district court on" the date of its enactment. 119 Stat. 311 (8 U.S.C. 1252 note). In such a situation, "the district court shall transfer the case * * * to the court of appeals for the circuit in which a petition for review could have been properly filed." *Ibid.* Following the transfer, "[t]he court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under [8 U.S.C. 1252]," with the exception that the alien is not subject to the usual 30-day filing deadline contained in 8 U.S.C. 1252(b)(1). *Ibid.*

2. a. Petitioner, a native and citizen of the Dominican Republic, was admitted to the United States on December 5, 1994, as a lawful permanent resident. Pet. App. 2a. He was arrested on November 29, 2001, and was indicted the following month on a series of drug offenses. *Id.* at 2a, 3a n.3. In February 2002, he pleaded guilty to a single count relating to an offense committed on or about August 29, 2001, and was sentenced to three years' imprisonment. *Id.* at 2a, 3a. When he committed the offense to which he pleaded guilty (and when he was arrested), petitioner had not yet accrued seven years of continuous residence in the United States.

b. In September 2002, the former INS commenced removal proceedings and directed petitioner to appear before an immigration judge to answer the charge that he was subject to removal on the basis of his controlled-substance-related conviction. Pet. App. 2a. One month later, upon his release on parole from state custody, the INS detained petitioner under the authority of 8 U.S.C. 1226(c). *Ibid.* Petitioner filed a habeas corpus petition

challenging the constitutionality of his pre-order immigration detention, which was granted by the United States District Court for the Southern District of New York on December 20, 2002. *Ibid.* The government released petitioner as directed but appealed the district court's order to the Second Circuit. *Ibid.* The court of appeals later dismissed that appeal as moot because petitioner's removal proceedings were completed, and also vacated the district court's order in view of this Court's intervening decision in *Demore* v. *Kim*, 538 U.S. 510 (2003), holding that pre-final-order immigration detention of criminal aliens without a bond hearing is constitutionally permissible. See *Grullon* v. *Ashcroft*, No. 03-2097 (2d Cir. Nov. 10, 2003); see also Pet. App. 3a n.2 (noting parties' agreement that "the rationale for the district court's habeas ruling was * * * subsequently rejected by" *Demore*).

c. Petitioner's removal hearings took place in 2003. Pet. App. 3a. Throughout those proceedings, he conceded removability, but claimed he was eligible for cancellation of removal. *Ibid.*; Certified Administrative Record (A.R.) 10. He contended that under Section 240A(d)(1)'s stop-time rule, his period of continuous residence should not be deemed to end until he was convicted in February 2002—a reading of the statute that he admitted the Board had rejected four years earlier in *In re Perez*, 22 I. & N. Dec. 689 (B.I.A. 1999) (en banc). Pet. App. 3a; A.R. 21-22. In November 2002, counsel represented that petitioner "will move for cancellation of removal under INA § 240A." A.R. 282; see also A.R. 286 ("Respondent will be filing an application for cancellation of removal under INA Section 240A(a)."). But the certified administrative record contains no Form EOIR-42A—a seven-page "Application for Cancellation of Re-

moval for Certain Permanent Residents." See 8 C.F.R. 240.20(a) (2002) ("An application for the exercise of discretion under section 240A of the [INA] shall be submitted on Form EOIR–42.") (now codified at 8 C.F.R. 1240.20(a)).

Instead, at an August 21, 2003, hearing held before the immigration judge, petitioner submitted a document entitled "Respondent's Brief in Support of Respondent's Application for the Exercise of Favorable Prosecutorial Discretion" (A.R. 8-46),[2] with exhibits (A.R. 47-235). Petitioner argued that he was eligible for cancellation of removal because the interpretation of the stop-time rule given by the majority of the Board in *Perez* "is unreasonable and * * * should be re-examined by the federal court (or the Board)." A.R. 22. Like the *Perez* dissenters, 22 I. & N. Dec. at 705-706, he contended that his reading of the statute was supported by one sentence of 1996 legislative history. A.R. 28-29. He also relied on the fact that a bill then pending in Congress would have eliminated the stop-time rule in INA Section 240A(d)(1)(B). A.R. 34, 104.[3] Finally, he argued at length (as the title of his brief promised) that the INS should exercise prosecutorial discretion to avoid removing him. A.R. 34-45.

In a summary order dated August 21, 2003, the immigration judge checked the boxes indicating that petitioner was denied cancellation of removal and that he

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[2] As the alien responding to the charge of removability, petitioner was designated as the "respondent" in his administrative proceedings.

[3] Another bill that would repeal the time-stop rule was introduced in the House of Representatives last year. See H.R. 4022, 110th Cong., 1st Sess. § 4 (2007).

was ordered removed to the Dominican Republic. Pet. App. 19a-21a.[4]

d. Although petitioner reserved the right to appeal, Pet. App. 21a, he did not file an appeal with the Board. In the court of appeals, petitioner claimed that he did not exercise his right to appeal because he thought it would increase the chance that he would be returned to immigration detention. *Id.* at 15a n.9.

On October 10, 2003, petitioner filed another habeas petition in the district court, this time challenging the removal order. Pet. App. 4a. Because that proceeding was pending when the REAL ID Act became effective, the district court transferred the case to the Second Circuit, where it was docketed as a petition for review. *Id.* at 18a; see p. 5, *supra*.

In the court of appeals, petitioner conceded that he failed to exhaust his administrative remedies by not filing an appeal to the Board, but he urged the court to exercise jurisdiction and consider the merits of his challenge to the Board's interpretation of the stop-time rule in *Perez*. Pet. App. 1a-2a.

3. The court of appeals treated the transferred petition as a timely filed petition for review under INA Sec-

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[4] As the summary order indicates (Pet. App. 19a), the immigration judge's oral decision becomes the "official opinion" if the proceedings are "appealed or reopened." In a case like this, the Board's usual practice would have been to have the oral decision transcribed if and when petitioner appealed to the Board. 8 C.F.R. 3.5(a) (2003) (now codified at 8 C.F.R. 1003.5(a)). Because petitioner did not appeal to the Board, no transcript was prepared. Pet. App. 4a n.4. Petitioner appears neither to have asked for a transcript to be prepared nor to have made arrangements for a "stipulation regarding the facts or events that transpired" before the immigration judge. See *The Board of Immigration Appeals Practice Manual* Chap. 4.16(f)(iv) at 52 <http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/toc full.pdf>.

tion 242, but dismissed it for want of jurisdiction. Pet. App. 5a, 17a.

Relying on *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), the court first held that the exhaustion requirement in INA Section 242(d)(1), 8 U.S.C. 1252(d)(1), is statutory and jurisdictional, and thus required petitioner to appeal to the Board before seeking judicial review. Pet. App. 6a-9a.

The court next considered whether the statutory exhaustion requirement is subject to any exceptions. It expressly rejected petitioner's contention that an appeal to the Board would have been "futile" because the sole legal issue he wished to raise had already been decided against him by a majority of the full Board in *Perez*. Pet. App. 9a-13a. The court pointed out that the Board "could have reconsidered the *Perez* holding *in banc*, or it could have certified the question to the Attorney General." *Id.* at 11a. Although the court recognized that there may be limitations to requiring exhaustion where, for example, the administrative tribunal lacks authority to provide relief or to take any action in response to the complaint, it concluded that petitioner's futility argument "confuses the likelihood of adherence to precedent with the factual impossibility of relief." *Ibid.*

For similar reasons, the court rejected petitioner's alternative argument that an appeal would have been futile because "streamlin[ing]" regulations authorizing a single Board member to affirm an immigration judge's decision without an opinion would purportedly have prevented the question from being referred to a three-member or *en banc* panel. Pet. App. 11a-12a. As the court noted, those regulations would not require a single Board member to affirm if the member were convinced by petitioner's argument about the stop-time rule and

did not think "that the result reached in the decision under review was correct." *Id.* at 12a (quoting 8 C.F.R. 1003.1(e)(4)(i)).

The court also rejected petitioner's claim that because the Board's consideration of his case would have been constrained by *Perez*, an appeal to the Board would not have afforded him any administrative remedy "available as of right" that must be exhausted under Section 242(d)(1). To the contrary, the court held that petitioner "had a right to appeal the [immigration judge's] order of removal to the [Board]. And [petitioner] was statutorily required to exercise that right before appealing to this Court, notwithstanding his small chance of success." Pet. App. 12a-13a. In doing so, the court of appeals characterized the Ninth Circuit as having found that an appeal to the Board that is foreclosed on the merits by adverse precedent is not "available as of right" under Section 242(d)(1), and it rejected that interpretation. *Id.* at 12a (citing *Sun* v. *Ashcroft*, 370 F.3d 932, 941-942 (9th Cir. 2004)).

The court also denied petitioner's efforts to construe his anti-exhaustion arguments as constitutional claims or as falling within an asserted "manifest injustice" exception to the statutory exhaustion requirement. Pet. App. 13a-16a. The court held that, because this Court's recent decision in *Bowles* "broadly disclaims the 'authority' of the federal courts 'to create equitable exceptions to jurisdictional requirements,'" there can be no "'manifest injustice' exception to the jurisdictional bar created by 8 U.S.C. § 1252(d)'s exhaustion requirement." *Id.* at 16a.

ARGUMENT

The court of appeals held that the exhaustion requirement in INA Section 242(d)(1), 8 U.S.C. 1252(d)(1), is mandatory, jurisdictional, and not subject to an exception for futility or manifest injustice simply because petitioner would have had to overcome adverse precedent within the agency. That holding is correct, and it does not conflict with any decision of this Court or of any court of appeals. Moreover, it is almost certain that a favorable ruling for petitioner on the exhaustion issue could not lead to a different result in his case on remand, because the court of appeals has repeatedly (and correctly) construed the stop-time rule in INA Section 240A(d)(1), 8 U.S.C. 1229b(d)(1), in a way that is inconsistent with petitioner's underlying argument. Further review is therefore not warranted.

1. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring exhaustion serves a number of purposes, including "preventing premature interference with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by

statute that exhaustion is required, a court may not "dispens[e]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766; accord *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.").

In this case, Congress has specified in the INA that judicial review of a final order of removal is contingent on exhaustion of the administrative remedies "available to the alien as of right." 8 U.S.C. 1252(d)(1). The statutory scheme, which requires an immigration judge to advise an alien of his "right to appeal" his removal order, 8 U.S.C. 1229a(c)(5), plainly allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 242(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an immigration judge's removal order becomes final only upon affirmance by the Board or upon expiration of the appeal period if no appeal to the Board is taken, whichever is earlier. Whether the Board would ultimately rule for the alien on the merits is irrelevant to whether an appeal to the Board—the relevant procedural remedy here—is "available to the alien as of right." And, consistent with Congress's directives, Department of Justice regulations provide that an immigration judge's removal order may not be executed during the appeal period or while review of the order is pending before the Board. 8 C.F.R. 1003.6(a). Cf. *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993) (concluding that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an

agency rule requires appeal before review and the administrative action is made inoperative pending that review").

This statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles*, 127 S. Ct. at 2365-2366 ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). Given the statutory underpinnings of the exhaustion requirement in removal proceedings, the court of appeals correctly applied this Court's decision in *Bowles* when it concluded that the requirement is mandatory and that petitioner's decision not to exercise his right to appeal his removal order to the Board deprived the courts of jurisdiction to consider his petition for review. Pet. App. 5a-9a.

Moreover, even if the exhaustion requirement in Section 242(d)(1) were not jurisdictional (in the absolute sense that it could not be waived by the government), it is still mandatory. Congress itself has specified that a "court may review a final order of removal *only if*—(1) the alien has exhausted all administrative remedies." 8 U.S.C. 1252(d) (emphasis added). See *Greenlaw* v. *United States*, No. 07-330 (U.S. June 23, 2008), slip op. 7, 8-15 (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); cf. *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises an objection of untimeliness).

2. a. Despite petitioner's claim to the contrary (Pet. 20), the courts of appeals are not "split 2 to 1 over the question presented."

The Fifth Circuit's decision in *Arce-Vences* v. *Mukasey*, 512 F.3d 167 (5th Cir. 2007), is readily distinguishable in several ways from that of the court below. As an initial matter, the Fifth Circuit was not presented with a situation in which the alien completely bypassed an appeal to the Board—conduct that, as this case demonstrates (see note 4, *supra*), has its own unfortunate consequences. The alien in that case did appeal to the Board, but failed to present a particular legal argument in that appeal. 512 F.3d at 170. In addition, *Arce-Vences* concluded that presentation of the particular legal argument to the Board in the first instance was unnecessary when the Board would have been powerless to depart from "clearly established *Fifth Circuit law* applicable at the time of its review." *Id.* at 172 (emphasis added). Here, by contrast, the agency unquestionably would have had the power to distinguish, refine, or depart from its own prior decision. Moreover, *Arce-Vences* makes no mention of *Bowles* and how it affects the analysis. Finally, the unexhausted question in *Arce-Vences* (whether the alien was an aggravated felon) affected the scope of the Fifth Circuit's own jurisdiction to review his petition, which meant that the court had jurisdiction to consider it in any event. See *Omari* v. *Gonzales*, 419 F.3d 303, 306 (5th Cir. 2005) ("Under 8 U.S.C. § 1252(a)(2)(C) this court does not have jurisdiction to review the removal decision if Omari's prior conviction was an aggravated felony. However, we do have jurisdiction to determine our own jurisdiction, *i.e.*, to determine whether the conviction qualifies as an aggravated felony.") (citation and footnote omitted).

The Ninth Circuit's decision in *Sun* v. *Ashcroft*, 370 F.3d 932 (9th Cir. 2004), also fails to present a square conflict with the decision below, despite the Second Circuit's statement (Pet. App. 12a) that it "reject[ed] the Ninth Circuit's interpretation." The aspect of the Ninth Circuit's discussion in *Sun* that is crucial to petitioner —the assumption that "an appeal foreclosed [on the merits] by an en banc Board decision" is not an appeal "as of right," Pet. 23—was not necessary to its decision. In *Sun*, the court recognized that INA Section 242(d)(1) imposes a mandatory exhaustion requirement where administrative remedies are "available to the alien as of right." See 370 F.3d at 941-942. The court posited that some issues "may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right,'" but reasoned that the realm of such issues "cannot be broader" than "the futility exception to prudential exhaustion requirements." *Id.* at 942. Against that backdrop, the court concluded that, because an en banc Board decision cited by the alien did *not* control his case, he "did not meet the futility standard for prudential exhaustion"—meaning that, *a fortiori*, administrative remedies were available under the "as of right" standard, which was at least as stringent. *Id.* at 944.

Sun thus simply concluded that the scenario it posited, in which administrative remedies may not be available as of right, was not present because a necessary condition for reaching such a result was not present. *Sun* does not affirmatively establish that the Ninth Circuit would actually hold that the requirement of taking an appeal to the Board could be dispensed with if an en banc Board decision *did* foreclose victory on the merits before the Board (as petitioner claims here). The consequence of such a holding would be to append to Section

242(d)(1) the very sort of judicially administered futility exception that this Court in *Salfi* and *Booth* rejected in the context of statutory exhaustion requirements. But even assuming the Ninth Circuit would have reached that result in a future case after *Sun*, it has not had a chance to address the relationship between prudential and statutory exhaustion requirements since this Court "sharpened the analysis" (Pet. App. 7a) of the prerequisites to judicial review in *Bowles*.[5] See *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1123-1124 (9th Cir. 2002) (recognizing that a panel "may overrule prior circuit authority without taking the case en banc when 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point'") (quoting *United States* v. *Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)).

Moreover, the other Ninth Circuit cases petitioner cites (Pet. 22) reveal that other factors present in this case would in any event warrant prudential exhaustion in the Ninth Circuit's view. In *Puga* v. *Chertoff*, 488 F.3d 812 (2007), the court required an alien to exhaust his ineffective-assistance-of-counsel claim by filing what would otherwise have been a discretionary motion to reopen, because aliens should not be allowed "to bypass the administrative scheme that is in place to deal with [such] claims." *Id.* at 815. In *Noriega-Lopez* v. *Ashcroft*, 335 F.3d 874 (2003), the court held that an alien

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[5] Even before *Bowles*, the Ninth Circuit applied *Sun*'s exhaustion analysis in only two unpublished memorandum dispositions. In both cases, the aliens had in fact appealed to the Board before seeking judicial review but failed to raise an unspecified claim of statutory construction that was foreclosed by Board precedent in some unspecified way. See *Murillo Noguez* v. *Gonzales*, 163 Fed. Appx. 485 (2006); *Orozco Segura* v. *Gonzales*, 159 Fed. Appx. 779 (2005).

did not need to move to reopen with respect to a question decided in his case by the Board *sua sponte*, because there was a "proper record available, * * * the [Board] necessarily decided the legal question," and there had been "no deliberate bypass of the administrative scheme." *Id.* at 881. By contrast, in this case, the record is inadequate, petitioner has altogether bypassed the agency's administrative scheme, and the Board did not get a chance to decide whether *Perez* applies to the case, whether *Perez* continues to reflect the Board's views, and whether petition might be granted or denied relief on grounds quite apart from *Perez*.

b. Petitioner's contention (Pet 27, 30-32) that the Board's decision in *Perez* and its streamlining procedures under 8 C.F.R. 1003.1(e)(4) have rendered an appeal in his case discretionary, rather than "as of right," are unavailing for two reasons.

First, allowing aliens to bypass the agency's internal appeal process is inconsistent with the fundamental nature of agency decisionmaking. Petitioner sought to overturn the agency's construction of a purportedly ambiguous statute (the stop-time rule in INA Section 240A(d)(1)). Agencies are entitled to change their positions on such questions, either on account of new facts or new policies, or even (as had occurred here since *Perez* was decided) "a change in administrations." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005). Under petitioner's view, however, once an agency's initial decisionmaker disposes of a contested case, the agency's top decisionmakers (here, either the Board or the Attorney General) may not even get the opportunity to reconsider their own, or their predecessors', interpretations before judicial review occurs. Appeals that challenge the Board's prior

decisions are the principal means by which it would gather information about the "wisdom of its policy on a continuing basis." *Id.* at 981 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 864 (1984)). But petitioner would deprive the Board of that means. Indeed, the deference that courts owe to the results of the Board's "process of case-by-case adjudication" concerning an issue like cancellation of removal, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)), would be subverted if aliens could routinely bypass the Board without giving it an opportunity to reconsider an issue in the light presented by later cases.

Second, petitioner's assertion that *Perez* would have required the Board to streamline his appeal is entirely speculative, because there is no foundation in the record for his assumption that the immigration judge denied his request for cancellation under *Perez* rather than on any other dispositive ground. *See* note 4, *supra*, and p. 22, *infra*. Nor is there any such foundation for the proposition that the Board would not have granted or denied his request on another ground. His argument also ignores the possibility of legal or policy developments that could have occurred while his appeal to the Board was pending (such as a refinement or reconsideration of *Perez* by the Board or the Attorney General, or a rejection of *Perez* by the Second Circuit). Such uncertainty about what the state of the law would have been when the Board would have considered and disposed of his case necessarily undermines his claim that an alien and a reviewing court should be permitted to determine *ab initio* that any appeal would have been futile in a case such as this. And petitioner's argument likewise ignores the importance of affording the Board an opportunity to determine in

the first instance whether a particular legal argument actually *is* foreclosed by a prior Board decision, and affording the reviewing court the benefit of the Board's expertise on that question. As a result, petitioner's denigration of the Board's streamlining procedures (which were never applied to his case) is especially misplaced.

c. Petitioner faults the court of appeals for relying on *Booth* v. *Churner*, *supra*, contending (Pet. 30-31) that the statute here differs from 42 U.S.C. 1997e(a), the section of the Prison Litigation Reform Act construed in that case. Petitioner's comparison between that statute and INA Section 242(d)(1) reveals nothing about whether an appeal to the Board is, as petitioner claims (Pet. 31), "merely 'discretionary,'" or rather is available "as of right," as the text of 8 U.S.C. 1229a(c)(5) establishes, see p. 12, *supra*.

d. Petitioner's policy argument (Pet. 28-29) that the decision below creates confusion, and will force aliens with limited resources to engage in "guess-work" to determine "how much exhaustion is enough," is precisely backwards. The court of appeals' decision makes clear that aliens must exhaust their right to appeal their removal orders to the Board before seeking judicial review. That this clear rule does not redound to the benefit of petitioner, who deliberately bypassed that course, is unfortunate for him, but, as this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review. Indeed, such judicially created exceptions "would no doubt detract from the clarity of the rule." 127 S. Ct. at 2367.

3. a. Even assuming that the court of appeals had jurisdiction to entertain petitioner's legal challenge to the Board's established interpretation of the stop-time

rule, this case would not be a suitable vehicle for the jurisdictional argument because the Second Circuit has already repeatedly (and correctly) described the stop-time rule in terms that reject petitioner's argument on the merits.

The stop-time rule in Section 240A(d)(1) of the INA provides that "any period of continuous residence * * * in the United States shall be deemed to end * * * (B) *when the alien has committed an offense* * * * that renders the alien * * * removable from the United States" under certain provisions of the INA. 8 U.S.C. 1229b(d)(1) (emphasis added). In *Perez*, the majority of the Board correctly interpreted that plain language as terminating the accrual of a period of continuous residence on the date the alien committed the relevant offense, rather than the later date of his conviction. See 22 I. & N. Dec. at 692-694. As petitioner concedes (Pet. 26), his "only argument on the merits is that the dissenters in *Perez*, rather than the majority, correctly construed the stop-time rule in [S]ection 240A(d)(1)." See also Pet. 17.

The Second Circuit, moreover, has repeatedly expressed approval of the conclusion reached by the *Perez* majority and thus disagreed with petitioner's underlying claim on the merits—both before and after its decision in this case. See, *e.g.*, *Martinez* v. *INS*, 523 F.3d 365, 369 (2008) ("[I]t is the date of the commission of the offense—not the date of the subsequent conviction—that matters for purposes of computing an alien's period of continuous residence" under Section 240A(d)(1)); *Reid* v. *Gonzales*, 478 F.3d 510 (2007) ("[T]his Court has itself recently stated that [Section 240A(d)(1)] cuts off a petitioner's period of continuous residence at the time he commits a criminal offense, not when he is convicted of

that offense."); *Tablie* v. *Gonzales*, 471 F.3d 60, 62, 64 (2006) (explaining that "[u]nder subsection 240A(d)(1), * * * the alien's continuous residency or physical presence ends, for purposes of cancellation of removal, on the date he commits a qualifying offense"; holding that alien's "1984 false statement ended his period of continuous residence"); *Kamagate* v. *Ashcroft*, 385 F.3d 144, 151 n.11 (2004) (measuring alien's continuous residence for purposes of Section 240A(d)(1) from the date of admission "until the October 30, 1996 start of the conspiracy on which he was [later] convicted"). Other courts of appeals have also described the stop-time rule as being based upon the date the crime was committed rather than the date of the conviction."

Accordingly, petitioner's underlying challenge to his removal order is itself futile. Any ruling in petitioner's favor on the jurisdictional issue would not change the result of his removal proceeding unless the Second Circuit or this Court decided—despite the decisions quoted above and the absence of any court of appeals authority to the contrary—to depart from the plain language of the statute governing the merits of his case (a question

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" See *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1321 (9th Cir. 2006) (explaining that Section 240A(d)(1) "'stops' an alien's accrual of continuous presence in the United States at the time that he commits a crime"); *Nuñez-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006) (explaining that Section 240A(d)(1)(B) "stops the accrual of time upon the commission of certain crimes"); *Peralta* v. *Gonzales*, 441 F.3d 23, 31 (1st Cir. 2006) (holding that there are three triggers to the stop-time rule in Section 240A(d), the second one being "commission of a specified crime"); *Hearon* v. *Gonzales*, 473 F.3d 167, 176 (5th Cir. 2006) (agreeing with *Peralta*); *Okeke* v. *Gonzales*, 407 F.3d 585, 590 (3d Cir. 2005) (treating "the commission of a controlled substance offense" as "a clock-stopping event" under Section 240A(d)(1)); see also *Dabuay* v. *Attorney General of U.S.*, 129 Fed. Appx. 747, 749 (3d Cir. 2005).

that is not fairly included within the question presented by the petition).

b. This case also presents a poor vehicle for further review because the record does not even make clear that petitioner was denied cancellation of removal on account of *Perez*'s interpretation of the stop-time rule.

Petitioner's arguments are predicated on the assumption that the "interpretation of the stop-time rule" governs "his eligibility for cancellation" of removal. Pet. 16. But, tellingly, he has no citation for his assertion (Pet. 17) that "the IJ pretermitted [petitioner's] application" after "[d]eclaring [him] to be ineligible for cancellation." As the court below recognized, because of petitioner's "failure to appeal to the BIA," "the record on this appeal" does not identify "the actual grounds for the order of removal." Pet. App. 4a n.4; see also note 4, *supra*.

Because the certified administrative record does not contain an actual application for cancellation of removal (Form EOIR-42A), petitioner's request could have been submitted past the filing deadline, or been deemed abandoned, and denied on that ground. 8 C.F.R. 1003.31(c) ("If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived."). It is also possible that the request was denied (perhaps in the alternative) in the exercise of the immigration judge's discretion—a question petitioner addressed at length in his brief to the immigration judge. A.R. 25-36; see also 8 U.S.C. 1229b(a) (providing that removal "may" be cancelled). As a result, the record does not establish that the denial of petitioner's request for cancellation rested *solely* (or at all) on the Board's decision in *Perez*.

Under these circumstances, petitioner is not well-positioned to claim that an appeal to the Board would have been futile. Pet. 20-33. Indeed, the deficiencies in the record help to illustrate the benefits of exhaustion. The filing of an appeal to the Board would not only have led to the transcription of any oral decision rendered by the immigration judge and clarified the reasons for the denial of relief, it would have allowed the Board an opportunity to correct any errors in that decision (on either legal or discretionary issues), or to decide his case on alternative grounds, perhaps rendering judicial review unnecessary or at least ensuring that it would be "informed and narrowed by the agenc[y's] own decisions." *Schlesinger* v. *Councilman*, 420 U.S. 738, 756 (1975). The court of appeals therefore reasonably and correctly required exhaustion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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